No. 93-288

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, AND MONSANTO COMPANY,
Petitioners,

v.

SUSAN B. BOYLE, ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND, et al.,
Respondents.

On Petition For A Writ of Certiorari To The Appellate Division Of The New Jersey Superior Court

PETITIONERS' REPLY BRIEF

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1. The petitioners have shown that the New Jersey courts disregarded this Court's decision and mandate in *Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986). Respondents ("New Jersey" or "the State") make but a half-hearted effort to meet that showing (Opp. 17-18), and instead seek to justify the decisions below by invoking this Court's decision in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (Opp. 8-17), and by contending that *Hunt* involves a narrow legal question that is unlikely to recur (*id.* at 8).

These tactics cannot obscure the significance of this case. At issue here is the integrity of the Supremacy Clause and this Court's decision in *Hunt*. *See Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari because of State court's non-compliance with Supreme Court mandate); *Sumner* v. *Mata*, 455 U.S. 591, 596-98 (1982) (same).

2. To the extent that New Jersey confronts *Hunt* (Opp. 17-18), it takes the same erroneous position that it has consistently taken since the enactment of CERCLA: It refuses to recognize the holding of *Hunt* that Section 114(c) pre-empted certain state taxes, and instead argues that the statute pre-empts only certain expenditures from the New Jersey Spill Fund.[1/]

In *Hunt*, this Court agreed with petitioners that "the New Jersey courts [had] violated the plain meaning of" Section 114(c), which is clear on its face: "[N]o person may be required to contribute to any fund" whose purpose is to pay compensation for costs and claims covered by CERCLA. The Court in *Hunt* thus held that the statute pre-empted taxes, not expenditures.[2/] The State itself recognized this crucial difference in prior filings,[3/] and it concedes the point now:

[1/] The most flagrant example of the State's misreading of *Hunt* is found at Opp. 18, where New Jersey asserts that "this Court's holding of partial preemption [in *Hunt*] focus[ed] on expenditures for preempted purposes rather than upon tax collections . . . ." *See also id.* at 9 ("the tax was perfectly valid if used for nonpreempted items"); *id.* at 15 ("CERCLA merely worked a partial preemption of two of the six *uses* of the Spill Fund"); *id.* at 18 (the lower courts' remedy "redresses any injury caused by the improper expenditure of Spill Fund monies").

[2/] *See* 475 U.S. at 361 (Section 114(c) forbids "the States to impose taxes to finance certain types of funds"); *id.* at 362 (question is whether Section 114(c) "forbids state taxation of the type the Spill Act imposes").

[3/] *See* Pet. 14 n.17 referring to an earlier New Jersey brief in opposition.

"[T]his Court held [in *Hunt*] that the actual expenditures made by the Spill Fund were irrelevant for determining what §114(c) meant . . . ." (Opp. 17).[4/]

Drawing upon the plain meaning of Section 114(c), this Court held that the tax enacted by the Spill Act could not be saved from pre-emption by arguments based upon Spill Fund expenditures:

> "New Jersey argues, finally, that after the enactment of CERCLA, . . . all Spill Fund expenditures for [CERCLA purposes] have been for non-Superfund eligible sites, and therefore are for non-pre-empted purposes. *To the extent that the Spill Act permits taxation to support pre-empted expenditures, however, it cannot stand.*"

475 U.S. at 376 (emphasis added).

Based upon this interpretation of Section 114(c), the Court remanded the case for the sole purpose of determining

> "the state-law question whether, or to what extent, the non-pre-empted provisions of the statute are severable from the pre-empted provisions."

Id. In so doing, the Court cited *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 196-97 (1983). *Eagerton*, in turn, had remanded a case, successfully challenging a state tax scheme as partially pre-empted by federal law insofar as it applied to

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[4/] The State attempts to qualify this concession by arguing that "nothing in the opinion of this Court [in *Hunt*] supports petitioners's [sic] position that expenditures [made by the Fund] are irrelevant for the purpose of remedy." Opp. 17. But the silence of *Hunt* on this point is hardly surprising, since the State did not argue that it could fashion a remedy based upon expenditures from the Fund. More fundamentally, the *Hunt* remand order left no room for the New Jersey courts to deny petitioners a tax refund based on a replenishment of the Fund. *See infra* 3-4.

sales of gas in interstate commerce, "to determine whether the partial invalidity" of a portion of the tax "entitles appellants to a refund of some or all of the taxes paid under protest." *Id.* at 197. Thus, the sole task contemplated in *Hunt* was for the State to determine, as a matter of New Jersey law, whether the challenged tax could be severed into pre-empted and non-pre-empted components, which would require a partial refund to petitioners, or whether it could not be so severed, which would require a full refund.

The New Jersey Tax Court *agreed* with petitioners that "the Spill Act contains a single tax that cannot be apportioned." App. 57a.; *see also* App. 59a. It conceded that if this Court in *Hunt* held (as it did) that "it was the *collection* of the tax that was improper," petitioners were entitled to a full refund of all of the taxes that they had paid. App. 65a. The New Jersey Supreme Court did not disturb this analysis,[5/] and the State similarly does not now challenge this interpretation of state law.[6/]

Thus, the state courts have answered the only question placed before them by the mandate of *Hunt*: The pre-empted tax cannot be severed. Petitioners are, therefore, entitled to a full refund of all the taxes that they paid while Section 114(c) was in effect. The state courts' denial of such relief to petitioners rests upon a blatant misreading of *Hunt*.

3. Respondents seek to justify denial of any relief to petitioners by invoking the "flexibility" (Opp. Br. 12) and "choice of options" (Opp. Br. 9) that they argue *McKesson*

5/ *See* Pet. 12 & n.14.

6/ To be sure, New Jersey notes that "[t]he Tax Court also found as a matter of state law that the preempted purposes of the Spill Act were severable from the remainder of the statute." Opp. 5, citing App. 61a. However, the Tax Court's opinion on this point, like the opinion of the New Jersey Supreme Court (App. 21a-26a), did not focus upon the severability of the pre-empted tax. Instead, it held that "the remaining [non-pre-empted] *purposes*" for which monies can be spent from the Spill Fund "are in no way dependent on the excised portions." App. 61a (emphasis added).

grants state courts in crafting a remedy for an unconstitutional tax.

This Court need not even consider the proper application of *McKesson*, because New Jersey's arguments in reliance on that case are undermined by the fundamental error discussed above: The "discretion" exercised by the New Jersey courts to deny petitioners any remedy was based on a clear misreading of *Hunt* and its interpretation of Section 114(c) as preempting expenditures, rather than taxes. Only such a distortion of this Court's holding could justify a "remedy" that makes the Spill Fund whole, but provides no relief for petitioners who have paid pre-empted taxes.

In any event, the "flexibility" afforded by *McKesson* is limited to impermissibly discriminatory taxes, 496 U.S. at 39-40;[7] all of the cases cited by New Jersey which recognized such remedial flexibility in state courts (Opp. Br. 11) have involved such taxes.[8] *McKesson* made clear, however, that for taxes which are "beyond the State's power to impose," a "State [has] no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress." 496 U.S. at 39.

The State's efforts to distinguish *McKesson* on this point based on the argument that the tax was only partially pre-empted fails for two reasons. First, it is inconsistent with the very decisions by the New Jersey courts in this case that the State defends. New Jersey contends that "*McKesson* still gives the State the opportunity to correct a defect by retroactively restructuring a *partially* valid tax by eliminating

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[7] Such flexibility is appropriate because the invalid element of the tax — discrimination — can be remedied through either a tax refund to out-of-state parties or a retroactive tax increase on in-state parties. By contrast, the taxes declared pre-empted by *Hunt* were not within the State's power to exact. Accordingly, the invalid element — the illegal tax itself — can only be redressed by a refund.

[8] *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993); *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991); *American Trucking Ass'n, Inc.* v. *Smith*, 496 U.S. 167 (1990).

the effects of the invalid portions." (Opp. 15, emphasis added). Here, of course, the New Jersey courts did not "retroactively restructur[e]" the pre-empted tax "by eliminating the effects of the invalid portions" of the tax. Instead, they held that the tax could not be so severed and restructured, and they provided no remedy to the taxpayer for the invalid portion of the tax.

Second, New Jersey's argument that the *per se* refund rule of *McKesson* applies only to "totally unconstitutional" taxes (Opp. 15) ignores *McKesson*'s reliance on *Atchison, T.&S.F.R. Co.* v. *O'Connor*, 223 U.S. 280 (1912), as an example of a tax "beyond the State's power to impose," which must be refunded. 496 U.S. at 39. The tax in *O'Connor* was only partially invalid, because it was not apportioned between property within the taxing state and out-of-state property. Nonetheless, the Court concluded that the taxpayer was "entitled to a refund of the portion of the tax imposed on out-of-state activity." *McKesson*, 496 U.S. at 32; *See also Eagerton*, 462 U.S. at 196-97 (contemplating refund for partially pre-empted tax).

Finally, New Jersey's argument that replenishment of the Spill Fund is an appropriate remedy under *McKesson* (Opp. Br. 15) ignores the fact that petitioners almost certainly would have lacked standing to challenge the New Jersey Spill Act, if they had complained only of improper expenditures and had sought reimbursement of the Fund for those expenditures. *See Doremus* v. *Board of Educ.*, 342 U.S. 429, 433-34 (1952); *Frothingham* v. *Massachusetts*, 262 U.S. 447 (1923). Petitioners had standing in this Court because they argued that they had been compelled to pay an unlawful tax and because they sought a tax refund to redress that injury. *See Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976).

4. The remedy of replenishing the New Jersey Spill Fund could not possibly be warranted unless expenditures had been preempted by Section 114(c) of CERCLA. *Hunt* rejected that reading of the statute. It was the exaction of the tax by New Jersey that was pre-empted, and the only "meaningful, backward-looking relief" that redresses the harm suffered by

the petitioners is a refund of the taxes that they paid while Section 114(c) was in effect.

CONCLUSION

The petition should be granted, and summary disposition is appropriate.

Respectfully submitted,

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